

A second preliminary hearing was held on November 4, 2013, at which claimant requested a change of an authorized treating physician. On November 5, 2013, the ALJ issued an Order granting claimant's request and appointing Dr. Baughman as claimant's treating physician. Subsequently, respondent deposed Mr. Williams, the assistant man-

ager of the Garden City restaurant where claimant was employed at the time of his accident. A third preliminary hearing followed on April 7, 2014, but no witnesses testified. The ALJ, in an April 10, 2014 Order, found claimant provided timely notice, stating:

The claimant previously testified that he reported his injury to Josh, a manager and used an interpreter. (See prior testimony). He had also stated that the day of his accident was his last day worked which was corroborated.

Based on all the evidence presented, it is found that the claimant gave proper notice of his accidental injury and the respondent's request to terminate medical treatment should be and the same is hereby denied.¹

Respondent raises the same issues as it did in its first appeal to the Board. Claimant asks the Board affirm the April 10, 2014 preliminary hearing Order.

The issues raised by respondent on appeal are:

1. What is claimant's date of accident?
2. Is claimant's accident the prevailing factor causing his injury and need for medical treatment?
3. Did claimant provide timely notice of his accident?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

The Findings of Fact contained in the Board's August 28, 2012 Order, is incorporated by reference herein.

At the November 4, 2013 preliminary hearing, claimant introduced several exhibits, including a medical report of Dr. C. Reiff Brown. Dr. Brown evaluated claimant on September 12, 2013. The report states that claimant was injured on February 20, 2012, while lifting a heavy trash can. Dr. Brown concluded:

This man has contusion of the left hip with muscular sprain of a chronic nature involving low back and left hip. In my opinion, there is a causal connection between his required work conditions and this accident. The accident is the prevailing factor

¹ ALJ Order (Apr. 10, 2014) at 2.

in causing the injury, his present medical condition, and his need for additional treatment.²

The medical records of Dr. Terry Hunsberger were also introduced at the November 4, 2013, preliminary hearing. Dr. Hunsberger's November 12, 2012 Medical Treatment Request/Work Restriction Report indicated claimant's date of accident was February 9, 2012.

A November 16, 2012 MRI report of Dr. Soen B. Liong, indicated claimant had minimal spondylolisthesis at the L4-5 with bulging disc noted, creating spinal stenosis at that level due to a combination of bulging discs, thickening of the ligamentum flavum and also prominent osteophyte. The doctor also noted claimant has a bulging disc at L5-S1 with narrowing of the neuroforamen bilaterally, but no spinal stenosis.

When he testified, Mr. Williams was the general manager of respondent's restaurant in Billings, Montana. He testified he was employed at respondent's Garden City restaurant from April 2009 through March 31, 2012,³ and was the assistant manager in January and February 2012.

Mr. Williams testified respondent's policy, when a worker was injured, was to complete an accident report, including witness statements by the injured worker and other witnesses. The worker would also be tested for alcohol and drugs.

According to Mr. Williams, claimant never reported a work injury in late January or early February 2013. Mr. Williams testified Haydee Ruiz, a crew leader, often interpreted for claimant. Mr. Williams did not recall Ms. Ruiz, reporting claimant had a work accident nor claimant bringing in a note from Dr. Garcia. Mr. Williams indicated that if claimant had reported a work accident an accident and witness reports would have been completed.

Mr. Williams testified he learned of claimant's accident three or four weeks after claimant's last day worked. Mr. Williams received an email from someone in human resources about a week before his last day in Garden City, informing him of claimant's accident.

Mr. Williams recalled claimant being terminated for missing work. He testified claimant's wife or daughter contacted Kevin Schmidt, Mr. Williams' supervisor, and indicated claimant was sick and would be missing some work. Mr. Williams saw claimant on his last day worked, February 9, 2012, but did not speak with him. Since February 2012, Mr. Williams has not looked at claimant's personnel file.

² P.H. Trans. (Nov. 4, 2013) Cl. Ex. 1 at 2.

³ Williams Depo. at 27.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁴ “Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.”⁵

With regard to claimant’s date of accident, this Board Member previously found:

In the record, there are four possible dates of accident listed in claimant’s Application for Hearing, three in Dr. Murati’s report and one in Dr. Garcia’s notes. Claimant testified that he was injured on January 30, 2012, but later said his accident occurred on February 9, 2012. Ms. Snodgrass’ February 17, 2012 notes, indicated claimant gave a history of having an accident three weeks earlier. The date of accident section of claimant’s Application for Hearing was completed in an imprecise and haphazard manner. The listing of several possible accident dates only served to muddy the waters.

This Board Member affirms the finding of ALJ Fuller that February 9, 2012, was claimant’s date of accident. Claimant testified at the preliminary hearing that the accident occurred on February 9, 2012, and that was his last day of work. Mr. Schmidt’s written document corroborated claimant’s testimony that his last day at work was February 9, 2012. At the preliminary hearing, claimant testified he first sought medical treatment for his injuries on February 10, 2012.⁶

Dr. Brown’s report indicated claimant reported an accident date of February 20, 2012. However, that report was generated in September 2013. Dr. Hunsberger’s November 2012 report stated claimant’s accident was February 9, 2012. At the initial preliminary hearing, claimant testified his accident occurred on February 9, 2012, which was his last day worked. Subsequent to the Board’s August 28, 2012 Order, insufficient additional evidence has been presented to dissuade this Board Member from affirming the ALJ and finding claimant’s date of accident was February 9, 2012.

Respondent contends claimant’s accident was not the prevailing factor causing his injury and need for medical treatment. Subsequent to the Board’s previous Order, additional medical evidence presented strengthens claimant’s position on this issue. Dr.

⁴ K.S.A. 2011 Supp. 44-501b(c).

⁵ K.S.A. 2011 Supp. 44-508(h)

⁶ *Hernandez v. Golden Corral*, No. 1060245, 2012 WL 4040472 (Kan. WCAB Aug. 28, 2012).

Brown opined claimant's accident was the prevailing factor causing his injury, medical condition and need for medical treatment. The MRI conducted by Dr. Liong revealed claimant had bulging discs at L4-5 and L5-S1. The prevailing factor opinions of Drs. Murati and Brown are uncontroverted by another physician. This Board Member finds claimant's February 9, 2012 accident was the prevailing factor causing his injury and need for medical treatment.

The focus of respondent's appeal is that claimant failed to provide timely notice of his accident to respondent. Claimant, at the first preliminary hearing, indicated he told a person by the name of Aide about his accident on the day it occurred. Aide is apparently Haydee Ruiz. Ms. Ruiz interpreted for claimant, who speaks only Spanish and has no formal education past the second grade. Mr. Williams did not have access to claimant's personnel file. He testified nearly two years after claimant's accident. The ALJ observed claimant testify on two occasions and apparently found him to be credible. Mr. Williams' testimony did not convince the ALJ to change her initial finding that claimant provided timely notice. This Board Member concurs and gives some deference on factual issues to the ALJ.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁸

WHEREFORE, the undersigned Board Member affirms the April 10, 2014, preliminary hearing Order entered by ALJ Fuller.

IT IS SO ORDERED.

Dated this ____ day of June, 2014.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

⁷ K.S.A. 2013 Supp. 44-534a.

⁸ K.S.A. 2013 Supp. 44-555c(j).

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Honorable Pamela J. Fuller, Administrative Law Judge